Supreme Court, U.S.
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No. 91-4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

INTERNATIONAL UNION OF OPERATING ENGINEERS
LOCAL NO. 12, AFL-CIO,
Petitioner,

v.

CARROLL WILSON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

ARGUMENT

1. Beginning with their counterstatement of the question presented, respondents' strategy is to remake this case into one of little importance in labor relations without the least regard for the facts or the decisions below.

(a) The brief in opposition thus characterizes the decision below as limited to situations in which "the fraud in question takes place completely outside the context of collective bargaining and has nothing to do with the ordering or development of labor relations or working conditions". Opposition to Petition for a Writ of Certiorari (Opp. Br.) at i. That is a blatant mischaracterization.

This case began as an action by joint labor-management trust funds to enforce the terms of an agreement signed by Mr. Wilson entitled, in large capital

letters, "OWNER-OPERATOR SHORT FORM *COLLECTIVE BARGAINING AGREEMENT* WITH THE INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL UNION NO. 12." (We attach the Agreement as an appendix hereto (emphasis supplied).) The first Article of the Agreement states, moreover, that "The Owner-Operator hereby recognizes the Union as the sole and exclusive bargaining representatives of all persons *employed* by the Owner-Operator who perform any work of the nature included in the craft jurisdiction of the Union." App. 1a (emphasis added).[1]

Given the document's title and first article, it is simply not true, as the Wilsons now represent, that "Wilson had not a clue that any kind of agreement purporting to regulate working conditions of employees was being proposed." Opp. Br. at 6. Certainly there is nothing in the jury verdict to suggest that the jury so concluded.[2]

Thus, the essence of the matter is that the *dispute* between the trust funds and the Wilsons involved the Wilsons' failure to pay contributions toward *fringe benefits for their employees* as promised pursuant to a document entitled a "Collective Bargaining Agreement."[3] Under

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[1] Article I goes on: "This Agreement covers only such of the Owner-Operator's activities in which he/she is functioning as an Employer, or is having persons or entities perform services for him/her." App. 1a.

[2] The jury found only that (1) Mr. Wilson did not know the *essential terms* of the Agreement before signing (not that he did not know that he was signing a collective bargaining agreement) (Pet. App. 19a); and (2) there was a false representation as to "the effect of the agreement on his status," (Pet. App. 24a). As to the latter, the Union, on appeal to the Ninth Circuit, argued that there could be no finding of fraud, because Mr. Wilson had simply to read the Agreement to discover its effect on his status. The Ninth Circuit did not address this defense, however, choosing to affirm the money judgments against the Unions on the basis of the "fraud in the inducement" claims here at issue. Pet. App. 6a.

[3] Certainly the fact that the negotiations were brief (Opp. Br. at 13) does not have any relevance to the applicability of § 301. Obviously, employers and unions are as bound by collective bargain-

these circumstances, the dispute is precisely whether the collective bargaining agreement's terms "ordering . . . labor relations [and] working conditions" (Opp. Br. at i) are enforceable.

(b) Not surprisingly, nothing in the Ninth Circuit opinion accepts the truncated view of this case put forward by the respondents in their opposition brief. To the contrary, the court of appeals explicitly decided the broad labor law issue raised in our *certiorari* petition.

The Ninth Circuit began from the premise that a § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, cause of action lay for fraud in inducing Mr. Wilson to sign the Agreement: That court repeatedly referred to the agreement in question as a "collective bargaining agreement" (Pet. App. 2a (twice), 3a, 7a, 10a), and recognized, as applicable to this case, the rule that "an action for fraud in the inducement is cognizable under section 301, to contest the formation of an agreement," (Pet. App. 9a).

Indeed, the court of appeals framed the § 301 issue before it as whether "section 301 preempts state law in all matters that pertain to the formation of collective bargaining agreements", (Pet. App. 8a), and relied exclusively upon cases arising in the context of collective bargaining agreeemnts, (Pet. App. 6a-10a citing *Allis Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985); *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988);

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ing agreements when they are able to reach agreement quickly as when they haggle over many bargaining sessions.

Nor can this case be placed outside § 301's ambit because the collective bargaining agreement in question was the first between the employer and the union, or because the agreement was one sanctioned by § 8(f) of the National Labor Relations Act, as amended, 28 U.S.C. § 158(f), and therefore entered into without any prior indication by the employers' employees that they had chosen the Union to represent them. *See Jim McNeff v. Todd*, 461 U.S. 266 (1983); *Woelke & Romero Framing Co. v. NLRB*, 456 U.S. 645 (1982). Nothing in § 301, or in any case law interpreting that section, draws any such distinctions.

Local 174 Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962); *Rozay's Transfer v. Local Freight Drivers*, 850 F.2d 1321 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1768 (1989) (*"Rozay's II"*)).

Equally to the point, the Ninth Circuit's holding was that a "state tort claim[] for fraud in the inducement is not preempted by section 301 *because it does not require reference to the collective bargaining agreement.*" Pet. App. 10a (emphasis added). This broad holding does *not* rest in any way on "unique facts" as to occurrences "completely outside the context of any collective bargaining agreement." Opp. Br. at 5-6.

2. The Wilsons maintain also that *certiorari* should be denied because issues concerning the validity of collective bargaining agreements are of no moment under national labor policy. In large part, their argument rests on the notion that because even if § 301 applies, fraud law principles derived from the law of the state in which the case arose would govern. Opp. Br. at 10-11. That understanding of § 301 and its office could not be more wrong.

The premise of this Court's § 301 opinions from *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), forward has been that the uniform enforcement of collective bargaining agreements is essential to a proper effectuation of national labor policy.

Not only do multistate agreements normally cover thousands of employees in numerous jurisdictions, but even local agreements are negotiated by national employers and labor organizations, and affect commerce nationally. Under the court of appeals' holding, moreover, a *single*, local collective bargaining agreement could give rise to damages under state law, because entered into as a result of fraud as defined by the state, while the agreement is at the same time enforceable under federal law as valid, because the negotiations do not violate federal fraud standards.

It is precisely because of these potential conflicts that "the subject matter of § 301(a) is 'peculiarly one that calls for uniform law.'" *Local 174 Teamsters v. Lucas Flour Co., supra*, 369 U.S. at 103 quoting *Pennsylvania R. Co. v. Public Service Comm.*, 250 U.S. 566, 569 (1919).

Lincoln Mills and its progeny make it clear, too, that state law should be adopted in § 301 cases *only* when there is no contrary uniform policy to be derived from the federal labor statutes and policies:

> [T]he substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws. . . . The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation in fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem. . . Federal interpretation of the federal law will govern, not state law. But state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate federal policy. [*Lincoln Mills*, 353 U.S. at 456-567.] [4]

Here, there are federal statutory provisions—NLRA §§ 8(a)(5), 8(b)(3) and 8(d), 29 U.S.C. § 158(a)(5), (b)(3) & (d)—which govern the process of bargaining for collective agreements, and from which principles governing § 301 damage actions for improper bargaining could and should be derived. *See* Petition for Writ of Certiorari ("Petition") at 18 n.10. These provisions, which encourage free collective bargaining subject to lim-

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[4] It was on that basis, of course, that this Court held that state law contract rules against enforcing agreements to arbitrate must give way to the national labor policy favoring the negotiation and enforcement of such provisions. *Lincoln Mills*, 353 U.S. at 456.

ited administrative and judicial supervision, preclude, for example, recognition of a cause of action under § 301 for *negligent* misrepresentations in the bargaining process. *See* Pet. 17-18. In contrast, if the states provide a fraud cause of action to govern the negotiation of collective bargaining agreements, a state could turn to ordinary tort principles, without regard to considerations flowing from federal labor policy, and make such negligence actionable.

The disuniformity between state and federal law governing fraud claims is not just a theoretical possibility; it is manifest in the history of this case. The district court instructed the jury that the Wilsons' state and federal fraud claims differed both as to the substantive offense (intentional versus negligent misrepresentation) and the recoverable damages.[5] The union business agent

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[5] The trial court ruled that emotional distress damages and punitive damages were available under the state law fraud claim but not under the § 301 claim regarding Wilson's status. In their opposition brief, respondents attempt to minimize the significance of the choice of law issue, arguing that "any realistic view of § 301 would include damages for lost time and emotional distress." Opp. Br. at 5. Neither the trial court's rulings nor any case authorities support this view.

Respondents cite two duty of fair representation cases in which the courts of appeals recognized the theoretical propriety of awarding emotional distress damages in a § 301 action. *Richardson v. Communications Workers*, 443 F.2d 974, 985 (8th Cir. 1971); *De Arroyo v. Sindicato de Trabajadores Packing*, 425 F.2d 281, 293 (1st Cir.), *cert. denied*, 400 U.S. 877 (1970). In neither case were such damages actually awarded. The *De Arroyo* court noted that it could conceive of awarding emotional distress damages only in an "exceptional case" involving "extreme conduct." In excising emotional distress damages from the Wilsons' § 301 claim, the trial court followed *Bloom v. Int'l Brotherhood of Teamsters*, 752 F.2d 1312, 1315 (9th Cir. 1984), another duty of fair representation case, where the court again left open the possibility of awarding emotional distress damages in a § 301 action, but limited their availability to cases involving "outrageous" conduct sufficient to support a non-preempted state tort claim for infliction of emotional distress. There is *no* authority for the proposition that emotional distress damages are available based on conduct surrounding the

was thus subject to two distinct standards of care in the course of a single conversation.

3. Respondents' attempt to wish away the circuit conflict outlined at pages 8-11 of the certiorari petition fares no better.

It is clear from their opposition brief itself that the Wilsons have been and still are contending that there is *no* § 301 jurisdiction over a fraud claim of the kind alleged here. Specifically, the Wilsons contend that where the plaintiff alleges that there was "not the mutual, knowing negotiation of a collective agreement envisioned by Congress and discussed in *Lucas Flour*", "[a]pplication of § 301 to such facts would miss the point of preemption." Opp. Br. at 13.[6] Thus, respondents' argument is not that there are concurrent federal and state interests in the subject matter of this law suit, but that there is no federal interest at all. As such, this contention—which has been in this lawsuit from the outset—necessarily raises the very question concerning the application of § 301 to collective bargaining agreement for-

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formation of a collective bargaining agreement, nor has this Court ever addressed their availability in any § 301 context.

The trial court also ruled that state and federal law differed with respect to punitive damages. Their unavailability under § 301 derives from policy concerns unique to federal labor law. *See Int'l Brotherhood of Electrical Workers v. Foust*, 422 U.S. 42, 50-51 (1979) (awarding punitive damages in duty of fair representation action would "impair the effectiveness of unions as collective-bargaining agents"); *Local 127, United Shoe Workers v. Brooks Shoe Mfg.*, 298 F.2d 277, 284 (3d Cir. 1962) (*en banc*) ("remedial" intent of § 301 precludes availability of punitive damages). While the jury declined to award punitive damages here, the cleavage between state and federal law regarding their availability further emphasizes the importance of the preemption issue and the broad range of questions that the Court may address by granting review of this case.

[6] While it is true that the Wilsons proceeded to trial on a § 301 fraud theory on the status statement (Opp. Br. at 6), they did so only because the trial judge ruled that § 301 governed. Throughout the pre-trial proceeding, the Wilsons argued that both of the "frauds" alleged were cognizable as state claims.

mation questions that respondents claim is not involved in this case.

As respondents' merger of the jurisdiction and preemption issues in their opposition brief demonstrates, the *ultimate* question involved in a matter such as this one is whether cases involving the validity of a collective bargaining agreement as a whole, as opposed to the application of discrete portions of the agreement, are to be tried under the laws of the various states, or under uniform federal law. That question, as we have noted, has been given *four* different answers by the various circuits:

(a) The Ninth Circuit holds that *either* state or federal law can apply.

(b) As the Solicitor General noted in his Brief for the United States as Amicus Curiae in *Local Freight Drivers, Local 208 v. Rozay's Transfer, Inc.*, Supreme Court No. 88-535 (*Rozay's II*), the Seventh, Third, Tenth, and Eleventh Circuit have treated the jurisdictional and preemption issues as one, holding that federal law applies.[7]

(c) Two circuits, the Fourth and the First, indicate that state law applies when the plaintiff is seeking only

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[7] These circuits, it is true, have not explicitly treated as a separate issue the question whether there is also jurisdiction under state law over identical questions concerning the formation of collective bargaining agreements. But the Tenth Circuit expressly relied upon the need to "develop uniform law" as one reason for finding § 301 jurisdiction over issues of contract validity, indicating that that court saw the questions whether there is jurisdiction under federal law over collective bargaining validity issues and whether there is *only* such jurisdiction, and none under state law, as one. *McNally Pittsburgh, Inc. v. International Association of Iron Workers*, 812 F.2d 615, 619 (10th Cir. 1987). And there is nothing in *I.B.E.W. Local 481 v. Sign-Craft, Inc.*, 864 F.2d 499 (7th Cir. 1988); *Mack Trucks, Inc. v. Intern. Union, UAW*, 856 F.2d 579 (3rd Cir. 1988); *Board of Trustees v. Universal Enterprises, Inc.*, 751 F.2d 1177, 1184 (11th Cir. 1985) to the contrary. The Solicitor General, in his brief in *Rozay's II*, *supra*, therefore, read all the cases holding that there is § 301 jurisdiction over contract formation issues as cases that necessarily apply "a uniform body of federal law" to the issues. *Id.* at 11.

to invalidate an agreement, not to enforce one, but federal law applies when the same issue is raised defensively.

(d) And one circuit, the Sixth, appears to hold that even if the validity question arises tangentially in the course of a suit seeking to *enforce* a collective bargaining agreement, there is no federal court jurisdiction over the issue. *See* Pet. 9-10.

Whenever a question of law has so divided the courts of appeal that there are more than two resolutions of the problem, the question is likely to be presented to this Court in a dispute in which the litigants have advocated some but not all of the possible theories and results. Nonetheless, the questions whether there is § 301 jurisdiction over a case of this kind, and whether there is *only* § 301 jurisdiction over such a case, are so closely linked that the answer to the first all but entails the answer to the second. It is only because the § 301 jurisdiction question had already been decided by the Ninth Circuit in *Rozay's II* that the court of appeals in this case was able to assume the answer to that jurisdictional question and to proceed directly to the preemption issue.

4. Finally, even taking the question presented here as one of first impression, respondents are wrong in their argument that the source of the law that governs disputes over collective bargaining agreement formation questions is not critical to the development of the national labor policy. Issues as to the validity of collective bargaining agreements based on the circumstances under which the agreements were negotiated arise with some frequency, and the possible conflict between state and federal law in adjudicating an agreement's validity would create intolerable confusion in both the negotiation and the application of labor agreements.

We believe that this Court's § 301 cases, read as a whole, point clearly to the conclusion that federal law, and federal law alone, governs in adjudicating such issues. But the court of appeals, and the respondents, have relied on a few sentences in recent opinions of this

Court, read out of context, to suggest that the federal law concerning the enforcement of collective bargaining agreements prevails over state law *only* where questions of contract interpretation are involved.[8]

To clarify that it was never this Court's intent to suggest that the area of § 301 preemption is narrower than the substantive coverage of the statute; to delineate the nature of a § 301 cause of action where one party seeks to establish that a collective bargaining agreement was entered into as a result of fraud; and to restore a nationally uniform federal common law governing the validity and application of collective bargaining agreements, this Court should grant *certiorari* in this case.

CONCLUSION

For the reasons stated above and in our Petition, this Court should grant certiorari and, after plenary review, reverse the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

Respectfully submitted,

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[8] The same language in *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988), discussing the need for the uniform interpretation of discrete contract clauses as a basis for § 301 preemption, has led to confusion in the court of appeal §301 preemption cases generally, including cases concerning state law causes of action different from those in this case. *See* the excellent summary and analysis in *McCormick v. AT&T Technologies, Inc.*, 934 F.2d 531, 539 (1991) (*en banc*) (Phillips, J., dissenting). This general difficulty in applying the "contract interpretation" approach to § 301 preemption is all the more reason to grant review in this case.

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APPENDIX

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OWNER-OPERATOR SHORT FORM COLLECTIVE BARGAINING AGREEMENT WITH THE INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL UNION NO. 12

THIS AGREEMENT is entered into this 14 day of May, 1982, by and between Wilson Equipment, hereinafter called OWNER-OPERATOR, and the International Union of Operating Engineers, Local Union No. 12, hereinafter called the UNION.

ARTICLE I

The OWNER-OPERATOR hereby recognizes the UNION as the sole and exclusive bargaining representative of all persons employed by the OWNER-OPERATOR who perform any work of the nature included in the craft jurisdiction of the UNION.

This Agreement covers only such of the OWNER-OPERATOR'S activities in which he/she is functioning as an Employer, or is having persons or entities perform services for him/her. Where the OWNER-OPERATOR is himself/herself performing services for another person or entity, the OWNER-OPERATOR recognizes his/her obligation under the applicable multiple-employer agreement to perform such services as an employee of such person or entity, unless in accordance with the applicable provisions of the multiple-employer agreement the OWNER-OPERATOR can be, and has been designated and recognized as a sub-contractor. (OWNER-OPERATOR recognizes that if unincorporated, pension or other fringe benefit contributions may not be made by the OWNER-OPERATOR on himself/herself.)

ARTICLE II

The OWNER-OPERATOR and the UNION hereby agree to accept and be bound by all the terms and con-

ditions of the multiple-employer master labor agreement, hereinafter called the Master Agreement, in effect in the geographic area in which the work is performed. The Master Agreement designated in Article V of this Agreement shall be applicable to the operations of the OWNER-OPERATOR to the same effect as if the terms and conditions of the Master Agreement were set forth in full herein, except as otherwise expressly provided herein.

The OWNER-OPERATOR and the UNION further agree that, unless this Agreement is terminated by written notice from the OWNER-OPERATOR to the UNION strictly in accordance with Article IV of this Agreement, the OWNER-OPERATOR shall be bound by any modifications, amendments, renewals, successors, replacements, additions, or extensions of the Master Agreement as may be established through collective bargaining between the UNION and the appropriate multiple-employer associations party to the Master Agreement.

ARTICLE III

To the extent that the Master Agreement contains provisions with respect to grievance procedures, arbitrations (other than jurisdictional disputes under the Impartial Jurisdictional Disputes Board in the Building and Construction Industry), or commitments not to strike over grievances or claims of contract violation, the same shall not be in effect nor binding upon the parties to this agreement. If the parties meet to attempt to settle any such grievances and claims of contract violation by direct negotiation between duly authorized representatives of each of the parties, then any such settlement shall be final and binding, provided, however, that the UNION may not settle any claim asserted against the OWNER-OPERATOR by the trustees of employee benefit trusts.

Nothing contained in this Agreement, expressly or by implication, shall in any way limit or modify the right of each party to enforce this Agreement or adjust grievances by means of judicial or economic procedures, in-

cluding picketing or withholding of services, except that enforcement of the subcontracting clause shall be by judicial procedures. In the event of any judicial enforcement by the UNION, it shall be entitled to attorney's fees.

ARTICLE IV

This Agreement shall become effective on the date entered into as stated above and shall continue in effect for the full term of the Master Agreement, and for such additional term or terms of any modifications, amendments, renewals, additions, successors, replacements or extensions of the Master Agreement incorporated herein as set forth in Article II of this Agreement, until and unless either party to this Agreement gives written notice to the other party, not more than one hundred twenty (120) days nor less than ninety (90) days prior to the termination date of the Master Agreement then in effect of its desire to terminate this Agreement. Notice to the Union shall be effective only upon receipt at the Union's main office in Los Angeles County, California.

ARTICLE V

The multiple-employer Master Labor Agreement indicated below is the Master Agreement referred to and incorporated in this Agreement.

( ) Master Construction Agreement	( ) Master Dredge Agreement
( ) Master Asphalt Plant Agreement	( ) Master Steel Tank and Machinery Erection Agreement
( ) Master Shop Agreement	( ) Master Sanitary Landfill
( ) Master Survey Agreement	( ) Master Truck Crane Agreement

( ) Other _____

Formerly Known as: _____

OWNER-OPERATOR:

Wilson Equipment

Name of Company (Please Print)

662 Grand Ave.

Company Address

Spring Valley CA 92077

City, State Zip

388 047

State License Number

/s/ C. E. Wilson

Signature

C. E. Wilson

Signed by (Please Print)

Owner

Title of Person Signing

662 Grand Ave. Spring Valley CA 92077

Signatory Address

444-58-6686

Signatory Social Security No.

464-6721

Telephone No.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 12

/s/ Illegible

Business Manager

/s/ Illegible

President

/s/ Illegible

Recording-Corresponding Secretary

/s/ Illegible

Business Representative

List name of each current employee of OWNER-OPERATOR, and Union affiliation, if any, of such employees at the time this agreement is signed.

NAME OF EMPLOYEE:	UNION AFFILIATION OR DESIGNATION (if any. If a member of UNION, list registration number)
Carroll Wilson	44-38.6686 Reg. # 1749671